

¹ The Board is reviewing the Post Award Medical Order in Docket No. 1,019,166. A companion case in Docket No. 1,020,836 will also be discussed as it relates to this appeal, and the confusion created with the intermingling of these matters.

ISSUES

1. Did claimant sustain her burden of proof that her current need for a left knee replacement was a direct and natural result of her October 2004 work-related accident and injuries?
2. Is this matter properly before the Board?

FINDINGS OF FACT

Claimant originally filed an E-1, Application For Hearing, with the Division on September 28, 2004, alleging an injury to her right leg, with subsequent low back pain from an altered gait. This series of injuries was alleged to have run from April 6, 2004, through September 7, 2004, and was assigned Docket No. 1,019,166 by the Division. The injuries were alleged to have resulted from climbing scaffolding while at work for respondent. This E-1 has not been amended.

A second E-1 was filed with the Division on December 28, 2004, alleging injuries to claimant's left leg, right leg and low back. The series of injuries allegedly ran from August 6, 2004, when claimant stepped off of a curb and experienced pain in her left leg, ending on October 26, 2004. This E-1 was assigned Docket No. 1,020,836 by the Division. This E-1 has also not been amended.

Claimant underwent medical treatment for her various injuries, including an arthroscopy of her right knee in May 2004 under the care of orthopedic surgeon Kenneth A. Jansson, M.D., and surgery to her left knee on March 8, 2005, also under the care of Dr. Jansson, consisting of a meniscus tear repair. Claimant was referred by the ALJ under Order of July 19, 2005, to occupational medicine specialist Robert A. Rawcliffe, Jr., M.D., for an independent medical evaluation (IME) on August 26, 2005. Dr. Rawcliffe examined and rated all of claimant's injuries, including both lower extremities and claimant's low back. The final rating calculated to 20 percent to the whole body.

On January 16, 2006, the parties entered into a settlement in Docket No. 1,019,166. Docket No. 1,020,836 is not listed on the transcript or worksheet for settlement. Neither the settlement transcript nor the worksheet for settlement mention the body part or parts being settled. The settlement is for a date of accident of April 6, 2004, and is for a 20 percent whole body award. It is apparently based on the 20 percent whole body rating provided by Dr. Rawcliffe in his August 26, 2005, report. This rating includes both lower extremities and claimant's low back, even though Docket No. 1,019,166 has never been amended to include the left lower extremity. The Statement Regarding Attorney Fees

and the basis for settlement do list both docket numbers. The basis for settlement notes that the possibility of future medical expenses for this injury are not expected to be necessary. Therefore, no award for future medical treatment was included in the settlement, although the right to request future medical treatment and a review and modification of the settlement award were left open as part of the settlement.

On January 9, 2007, claimant filed an E-4, Application For Post Award Medical, in Docket No. 1,019,166, requesting treatment as recommended by Dr. Jansson and a referral to Paul C. Pappademos, M.D., a knee replacement specialist.

An E-3, Application For Preliminary Hearing, was filed with the Division on March 31, 2008, in Docket No. 1,020,836. The attached letter of March 27, 2008, requests medical treatment for claimant's left knee and references the February 13, 2008, report of physical medicine and rehabilitation specialist Pedro A. Murati, M.D. In that report, Dr. Murati refers to an eventual need for a total knee replacement for claimant's left lower extremity.

A Notice of Preliminary Hearing in Docket No. 1,020,836 was filed April 24, 2008, indicating a hearing was scheduled for May 22, 2008. However, no hearing was held that date as the parties agreed that the ALJ should, instead, refer claimant, by Order of May 22, 2008, to Dr. Jansson for an evaluation and recommendation. Dr. Jansson evaluated claimant on June 18, 2008, recommending claimant return to Dr. Pappademos in order to proceed with the left knee replacement. Dr. Jansson was unable to state definitively whether the need for the knee replacement was due to claimant's injuries while working for respondent.

A second Notice of Preliminary Hearing in Docket No. 1,020,836 was filed on July 9, 2008, indicating a hearing was scheduled for July 22, 2008. The parties appeared before the ALJ on that date with claimant requesting the left knee replacement. Testimony was taken and exhibits were entered into the record. At that hearing, it was stipulated that claimant stepped off a curb in August 2004 and injured her left knee.

For reasons not explained in this record, the parties appeared before the ALJ again on August 5, 2008, at a Post Award Hearing and requested that the docket number for the Preliminary Hearing held on July 22, 2008, be changed to Docket No. 1,019,166. On August 11, 2008, the ALJ entered a Post Award Medical Order in Docket No. 1,019,166, denying claimant's request for the left knee replacement, finding that the need for the replacement was not a direct and natural result of claimant's 2004 injury. No Order has been issued in Docket No. 1,020,836.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534 states:

(a) Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge. The director shall forthwith mail a certified copy of the application to the adverse party. The administrative law judge shall proceed, upon due and reasonable notice to the parties, which shall not be less than 20 days, to hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.

(b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.²

K.S.A. 44-534a(a)(1) states:

(a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge

² K.S.A. 44-534.

who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.³

K.S.A. 2004 Supp. 44-510k states:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.⁴

Claimant filed both an Application for Hearing and an Application for Preliminary Hearing in Docket No. 1,020,836. The matter went to preliminary hearing on July 22, 2008. At that point, the process became confused when the parties changed the docket

³ K.S.A. 44-534a(a)(1).

⁴ K.S.A. 2004 Supp. 44-510k.

number to Docket No. 1,019,166, a docket listing a right leg and low back injury, with no amendment to consider a left knee injury. The Order by the ALJ denying claimant's request for medical treatment to her left knee in Docket No. 1,019,166 was appropriate, although for the wrong reason. The ALJ had no jurisdiction to issue an order on the left knee in Docket No. 1,019,166 as that injury had never been alleged in that case.

Both K.S.A. 44-534 and K.S.A. 44-534a are clear in requiring specificity regarding the injuries alleged, the material facts surrounding those injuries, and the benefits being sought at preliminary hearing. Those requirements have not been met herein. An Order should not include treatment for an injury not claimed. There is no indication in this record that the parties consolidated these matters or amended the E-1s to include different areas of the body. There remains the confusion created with the co-mingling of the above two cases. It does not appear that claim was ever made for a left knee injury in Docket No. 1,019,166 and the matter of claimant's request for treatment for her left knee in Docket No. 1,020,836 remains undecided. Therefore, this matter will be remanded to the ALJ for a clarification of the record and a determination of claimant's right to a left knee replacement in either Docket No. 1,019,166 or Docket No. 1,020,836.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds that claimant's request for medical treatment to her left knee in Docket No. 1,019,166 should be reversed and the matter remanded to the ALJ for a determination as to claimant's need for and entitlement to a left knee replacement in Docket No. 1,019,166 or Docket No. 1,020,836.

AWARD

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Appeals Board that claimant's request for medical treatment to her left knee in Docket No. 1,019,166 should be and is, hereby reversed, and this matter is remanded to the Administrative Law Judge for a determination of claimant's entitlement to and need for a left knee replacement in Docket No. 1,019,166 or Docket No. 1,020,836.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge